ANNUAL REPORT

for the fiscal year ending
March 31, 2000

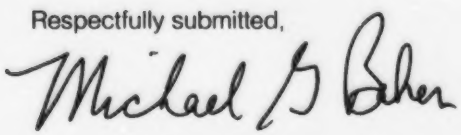
Workers' Compensation Appeals Tribunal

To Her Honour
The Honourable Myra A. Freeman
Lieutenant-Governor

May It Please Your Honour:

I have the honour to submit the Annual Report of the Workers' Compensation Appeals Tribunal for the fiscal year ending March 31, 2000.

Respectfully submitted,



Michael G. Baker, Q.C.
Minister of Justice

100-06873/

Michael G. Baker, Q.C.
Minister of Justice

Dear Honourable Minister:

The Workers' Compensation Appeals Tribunal is pleased to present its Annual Report for the fiscal year ending March 31, 2000.

Respectfully submitted,

K Carrigan

Katherine F. Carrigan
Chief Appeal Commissioner

Contents

Reducing the Backlog:
Report of the Chief Appeal Commissioner 9

Who's New at WCAT 13

Bill 90: Adapting to Change 16

Backlog Elimination Strategy 19

ADR: Phase II Completed 24

Chronic Pain 27

Environmental Illness 31

Other Decisions of Note 33

Financial Data 38

Statistics 39

Reducing the Backlog:

REPORT OF THE CHIEF APPEAL COMMISSIONER

In 1999, the Tribunal significantly reduced the appeal backlog which has faced us from the beginning. At the close of fiscal 1998, we had 2429 appeals in our backlog. This number was reduced to 545 by the end of March 2000—a 78 per cent reduction. We credit the reduction to the successful implementation of a backlog elimination strategy developed by our previous Chief Appeal Commissioner and me, in consultation with the Workers' Advisers Program and the Workers' Compensation Board. Ultimately, the success of the backlog plan was brought about by the cooperative efforts of the WAP, the WCB and employer community, and in no small measure by the dedication and hard work of our Appeal Commissioners and staff.

While reducing the backlog was the primary goal of the plan, a secondary purpose was to prevent a further backlog from developing over the course of the next year and a half. To that end, we structured the plan to allow us to decide "new appeals" (those filed on and after April 16, 1999), in a parallel stream with the backlog.

The introduction of Bill 90—An Act to Amend Chapter 10 of the Acts of 1994–95, the Workers Compensation Act, S.N.S. 1999, c.1—on April 16, 1999 meant that the Tribunal faced a legislated deadline of 18 months from the introduction of the legislation to resolve the previously filed appeals. With time lines in place, there was an immediate need to increase the Tribunal's Appeal Commissioner complement. We did this in early August, nearly doubling our previous numbers to approximately 24 Commissioners. This level of membership was maintained throughout most of 1999.

In the course of reducing the backlog, the Tribunal rendered decisions in several areas of importance for the workers' compensation system, adapted to the changes specified by Bill 90, and made progress toward accomplishing some of the goals identified in the Auditor General's Report.

Chronic pain is one area in which the Tribunal moved forward with leading case panel decisions; another was environmental illness syndrome. The Tribunal also broke new ground or clarified existing decisions in 1999 in the following areas:

- employer assessments
- reconsideration by the WCB of its decisions
- relationship between the Government Employees Compensation Act and the Workers' Compensation Act
- scope of the Tribunal's jurisdiction to render decisions on appeal
- test for awarding temporary earnings replacement benefits
- calculating permanent benefits for workers injured during the "window period" —March 23, 1990 to February 1, 1996

Some of our decisions on these issues are currently before the Court of Appeal while others have received final decisions of the Court or have not been appealed.

Bill 90 affected the Tribunal's decision-writing process in a number of ways, requiring adaptation on our part. Perhaps the most significant effect was the elimination of the leave stage and the grounds of appeal.

Prior to Bill 90, the Act required the Tribunal to consider whether an appellant had established it was "fairly arguable" that the Hearing Officer had made one or more of several errors specified in the Act. If the Tribunal found a "fairly arguable" error, leave would be allowed. In its final decision, the Tribunal would first determine whether or not an error was made by the Hearing Officer. The Commissioner would then proceed to the merits of the appeal, reviewing all of the evidence, including new reports or testimony received by the Tribunal.

With the introduction of Bill 90, the process was streamlined, such that leave to appeal was no longer a necessary step. Appeal Commissioners now consider all evidence before them and conduct a complete review of the merits of the claim from the outset. This review is based on the issues which were before the Hearing Officer.

In addition to the impact on our decision-writing process, Bill 90 affected the Tribunal administratively. For example, with the introduction of Bill 90's provisions for re-instatement of amended interim earnings loss (AIEL) benefits for workers injured prior to March 23, 1990, the Tribunal developed a process by which appellants or their representatives could elect to receive re-instated AIEL benefits and discontinue their appeal. A completed "election form," received by an appellant, would be forwarded to the Board with a request that the appellant be paid the benefits in question. The election form also served to notify the Board and the employer that the appeal file was being closed. A total of 27 eligible Tribunal appeals were resolved through the "election" process.

During the year, the Tribunal addressed some of the concerns raised by the Auditor General in its report and improved its organizational structure and processes in several areas:

- we initiated a performance appraisal and planning process for all Commissioners
- we put decision targets in place
- Appeal Commissioners were organized into teams, based on appeal type or issue
- we streamlined our standardized letters and eliminated some correspondence when the leave stage was eliminated
- we simplified the oral hearing scheduling process
- we upgraded our computerized system for tracking appeal statistics
- we entered into a cooperative venture with the WCB and the WAP to enhance electronic sharing of information between the three organizations
- we continued our monthly "Tripartite Committee" meetings with the WCB and the WAP to address administrative issues affecting all three organizations
- WCAT participated in Teleworking, a government pilot project, that enabled an Appeal Commissioner to work out of her home via electronic connections with the Tribunal

Quite apart from the changes flowing from the Auditor General's Report, Bill 90, and our backlog plan, 1999 was a year of significant change and adjustment for the Tribunal on another front. In May, I was appointed Acting Chief Appeal Commissioner and remained in this position until January, when I was appointed Chief Appeal Commissioner.

I would like to take this opportunity to thank our former Chief for laying the groundwork for what we have accomplished this year and for the strong support she showed us. I believe I speak for the Tribunal in saying that her leadership was certainly missed during the remainder of this challenging year.

Reflecting on the past year, I believe the Tribunal has accomplished much of what it set out to do in reducing the appeal backlog. We anticipate completing this task in the coming months, then turning our attention to matters that will assist us in fulfilling our appeal function. The development of administrative policies and procedures, a code of conduct for Tribunal members, and a business plan are representative of the areas of focus for the Tribunal in 2000–01, following elimination of the appeal backlog.

In closing, I wish to acknowledge the tremendous contribution made by Appeal Commissioners and staff who worked with the Tribunal during 1999–2000. Even more significant than their contribution to reducing appeal volumes is their commitment to decision quality and the service of WCAT's appeal participants. I look forward to working with Appeal Commissioners and staff as we enter the final phase of the backlog plan and I anticipate, with interest, a new phase in the life of the Tribunal, after the backlog is resolved.

Katherine F. Carrigan
Chief Appeal Commissioner

Who's New at WCAT

Rosalie A. (Rose) Armstrong of Halifax, Nova Scotia attended St. Francis Xavier University, where she received a B.A. Hons in English Literature as well as a B.Ed. She worked in Latin America as a teacher and as an environmental worker before graduating from Dalhousie Law School in 1998. She articled in Halifax and was called to the Nova Scotia Bar in 1999.

Karen Crombie received her law degree from the University of Toronto in 1988. She conducted a civil litigation practice in Toronto and in Halifax before joining the Tribunal in 1999. Karen was raised in Ontario and in Alberta, where she received her undergraduate degree from the University of Calgary. Karen has lived in Halifax since 1995.

Jennifer Grandy was raised in Halifax, and received her B.A. in English from the University of Kings College and Dalhousie University in 1995. She received her law degree from the University of New Brunswick in 1998. Jennifer articled in Truro and was called to the Nova Scotia Bar in 1999.

Angela Green was raised outside of Baddeck on Cape Breton Island. She attended the University of New Brunswick, where she obtained both her B.A.(History) and her LL.B. She is a recipient of the Lord Beaverbrook Scholarship in law. Following her call to the Nova Scotia Bar in 1997, she practised in a private law firm in Halifax.

Mary Ellen Greenough grew up in Dartmouth and attended Saint Mary's University where she graduated with a B.A., double major in Psychology and English (Hons) in 1994. She graduated from Dalhousie University with a Bachelor of Laws in 1998. She articled in Halifax and was called to the Nova Scotia Bar in 1999.

Michael Lambert was born in the northeast of England and raised in the west of Scotland. He received his law degree from the University of Glasgow. He had a private law practice and was Procurator Fiscal Depute in Oban, Scotland, before emigrating to Nova Scotia. After his call to the Nova Scotia Bar in 1973, he practised with Nova Scotia Legal Aid from 1973 to 1983 before returning to the private practice of law in Halifax from 1983 to 1997.

Louanne Labelle grew up north of Montreal, Quebec. She attended Université de Montreal, graduating with a civil law degree. She worked in Ottawa as a research officer for Parliament until moving to Nova Scotia and attending Dalhousie Law School to obtain her common law degree. She then practised law in Dartmouth for several years, as well as working as a Small Claims Court Adjudicator in Halifax from 1994 to 1999.

Natalie D. Macdonald of Marion Bridge received her B.A. from the University College of Cape Breton in 1991, and her law degree from the University of New Brunswick in 1994. She was admitted to the Nova Scotia Barristers' Society in June 1995. She articled and practised law in Sydney until August 1999.

Christa MacKinnon is originally from Marion Bridge. She received her B.Com., major in Accounting, from Mount Allison University in 1994 and her law degree from the University of New Brunswick. She was called to the Bar of Nova Scotia in June 1999. She is presently practising with the federal Department of Justice's Tax Law Services.

Matheson MacKinnon was born in the Highlands of Scotland and emigrated to Cape Breton at age 10. He attended Dalhousie University and received a B.A. from the University College of Cape Breton. He worked in business in Toronto for several years, before returning to Scotland and earning a law degree from the University of Edinburgh in 1994. He worked for three years in the area of corporate/antitrust and legislative issues in Washington, D.C., until returning to Canada in 1999.

Andrew MacNeil was born in Antigonish and attended St. Francis Xavier University, where he received a B.A. (Hons) in Political Science. He graduated from Queen's University, at Kingston, with an LL.B. and returned to Nova Scotia where he was called to the Bar in 1989. Except for a four-year period spent in Ottawa, his legal career has been in private practice in Nova Scotia, including time as a Worker's Counsellor prior to passage of the new Workers' Compensation Act.

Michelle Margolian was raised in Digby. She attained her B.A. (Hons) degree in Political Science from Acadia University and her LL.B. from Dalhousie University. Following her call to the Nova Scotia Bar in 1992, she practised with the Nova Scotia Department of Justice and a private law firm in Halifax.

Brian Sharp grew up in New Glasgow, lives in Halifax, and comes to WCAT from the business sector. His private practice experience focused on litigation, especially family law and child protection. In addition to his law degree, Brian holds bachelors and masters degrees in business. He has volunteered extensively with groups addressing health and community development issues.

Susan Young of Halifax attended Saint Mary's University, where she received her B.A. (Sociology) and a Certificate in Criminology. While working toward her undergraduate degree, she worked as an LPN at a local privately owned health care facility. She received her LL.B. from the University of New Brunswick in 1998 and was called to the Nova Scotia Bar in June 1999.

Bill 90: Adapting to Change

Two weeks into our fiscal year, Bill 90 was passed. The amending legislation introduced several areas requiring consideration on the part of the Tribunal. The following are highlights of those aspects of Bill 90 which had a particular impact on the Tribunal's administrative processes and some of the measures taken in response:

- WCAT reports to the Minister of Justice, who becomes responsible for the supervision and management of WCAT, effective October 1999.
  - The Tribunal initiated a formal monthly reporting relationship with the Minister of Justice, effective October 1999, in relation to its appeal statistics and activities.
- WCAT is to notify the WCB that an appeal has been filed and provide the WCB with a list of issues raised by the appeal.
  - A Notice of Appeal, containing a summary of the issues on appeal, is forwarded to the Board by WCAT with a letter notifying the participants of the mode of hearing and the submission deadlines (where applicable).
- Leave to appeal to WCAT is eliminated.
  - The Tribunal's appeal applications were amended from an Application for Leave to Appeal to a Notice of Appeal format.
  - The Tribunal no longer issues leave decisions nor does it consider grounds of appeal.
- WCAT must eliminate its backlog of appeals filed before April 16, 1999, by October 2000.
  - For purposes of facilitating the resolution of appeals in an efficient and consistent manner, Appeal Commissioners were assigned to teams, each headed by a senior Appeal Commissioner who acts as Team Leader.
  - Teams are based on either issue or decision type. The following teams were established: chronic pain, ADR, backlog appeals, and new appeals.

- WCAT must render a decision within 60 days of an oral hearing or paper review.
  - Submission due dates are coordinated, so that all appeals which are ready for a decision can be assigned to an Appeal Commissioner shortly after submissions are received.
  - Letters are sent at regular intervals, specifying submission and evidence deadlines and indicating the mode of hearing (paper review or oral).
  - Decision release is tracked on a monthly basis (recognizing that not all decisions can be released within 30 days from the receipt of submissions).
- WCAT is required to issue decisions stating the reasons as briefly as possible and without undue elaboration.
  - A decision length standard of five pages was set, recognizing that there are circumstances which warrant lengthier decisions.
  - Internal guidelines were developed to assist Appeal Commissioners in determining whether a longer decision is warranted in a particular case.
  - Appeal Commissioners generally discuss the need for lengthier decisions with their team leaders before deciding to issue a longer decision.
- ADR is given legislative authorization and is stated to be available to appeals involving both pre- and post-February 1, 1996 accident dates.
- WCAT must release its annual report within 90 days of its fiscal year end.

In addition to the administrative implications of Bill 90, there were a number of other changes, some of which are substantive in nature and may affect the decisions we write. Some of the pertinent changes are as follows:

- Board policy is only binding on WCAT where the policy is consistent with the Workers' Compensation Act
- the reconsideration stage in the WCB's Internal Appeals process is eliminated

- workers no longer require an increase of 10 per cent in their PMI to be eligible for an increase in their permanent impairment benefit or clinical rating schedule benefit

- the Act provides a definition of chronic pain and states that a personal injury by accident that occurred before February 1, 1996 is deemed never to have created a vested right to compensation for chronic pain

- compensation for workers with chronic pain injured on or after March 23, 1990 and before February 1, 1996 is limited to the benefits set out in s. 10E of the Act

- the date of recalculation of permanent benefits for workers injured in the window period, from March 23, 1990 to February 1, 1996, is specified as February 1, 1996

- any participant to a WCAT appeal may appeal a final order, ruling, or decision of WCAT to the Court of Appeal on questions of both law and jurisdiction

Backlog Elimination Strategy

With the passage of Bill 90 and WCAT's legislated deadline to reduce its appeal backlog, the Tribunal implemented a backlog elimination strategy (backlog plan).

The plan aimed to eliminate WCAT's approximately 2400-appeal backlog by October 15, 2000 in accordance with Bill 90 while preventing a future backlog through the issuance of timely decisions in relation to appeals filed after passage of the Bill.

Development of the plan took into consideration the fact that approximately one third of WCAT's backlog of appeals appeared to be chronic pain, as defined in the Board's Functional Restoration Program Regulations. These appeals were further identified as involving approximately 600 post-March 23, 1990 injury dates and approximately 200 pre-March 23, 1990 injury dates.

It was also noted that prior to proclamation of Bill 90 on April 16, 1999, WCAT was receiving approximately 50 new appeals per month. With the elimination of the reconsideration phase at the Workers' Compensation Board, it was anticipated that there would be an increased number of appeals filed with WCAT, estimated at approximately 80 per month.

With these factors in mind, the Tribunal focused on both eliminating the backlog and preventing a future backlog of appeals.

"It has been rewarding to see the appeal backlog gradually reducing each month. I'm enjoying being a part of a team with a common goal."

- Rose Armstrong, Appeal Commissioner

Elimination of the Backlog

- **Appointment of New Appeal Commissioners:** In order to eliminate the current backlog within 18 months of the date of proclamation of Bill 90 and, simultaneously, to avoid the development of a future backlog of appeals, WCAT determined that 13 new Appeal Commissioners would be needed. A competition was held in June, with the appointees beginning their employment with WCAT in early August. By September, these Commissioners had completed an in-house education and training program and had commenced issuing decisions. A mentor program was initiated at this point, pairing the newly appointed Commissioners with more senior members of the Tribunal.

- **Issues Streaming:** Appeal Commissioners were assigned to teams based on a division of appeals into the categories of chronic pain, backlog (non-chronic pain appeals filed with the Tribunal prior to April 16, 1999), new appeals (non-chronic pain appeals filed with the Tribunal on and after April 16, 1999), and ADR. A senior Appeal Commissioner was appointed leader of each of the teams. That person oversees the work of, and acts as a resource to, the Appeal Commissioner team members. The Team Leader also reports monthly to the Chief Appeal Commissioner on the group's progress.

- **ADR:** WCAT used Phase II of the Alternative Dispute Resolution, [ADR] Program to resolve approximately 204 appeals by way of settlement agreements and Tribunal decisions. Four Appeal Commissioners were exclusively assigned to conduct ADR sessions and issue decisions resulting from those sessions until the project's conclusion at the end of January. At its height, the team issued as many as 27 decisions per month. The decisions which resulted from ADR settlements were brief (two to three pages) and used a template format suitable to the nature of the settlement process.

- **Brief Decisions:** As of April 16, 1999, WCAT began issuing brief decisions of five pages in length. Longer decisions are generally issued only where they meet specified criteria, such as where novel issues of significance to the Workers' Compensation system are at issue or where the decision is being made by a panel of Appeal Commissioners. The issuance of shorter decisions assists in the resolution of WCAT's backlog and fulfils our legislated responsibility to write briefer decisions.

- **Decision Templates:** Certain appeal types, such as the chronic pain categories, lend themselves to the use of standardized decision formats. With the passage of s.10E, for example, the Act set out legislative criteria for the determination of chronic pain which, if met, resulted in a uniform benefit. Recognizing this, the Tribunal established standard decision formats for rendering decisions in this category of appeals. Since February, we have been using a template format for preliminary decisions which identify the presence of chronic pain. Standard decision formats were also used by the ADR team for implementation of settlement agreements. In both chronic pain and ADR appeals, the decision formats or templates apply only to those parts of the decision which can be standardized; their use has not eliminated the need for individualized adjudication in any of these cases.

- **Decision Targets:** Decision target expectations for Appeal Commissioners vary, depending upon the appeal category. Monthly decision targets of approximately 10 decisions per month were set for Appeal Commissioners. This target applies to the non-chronic pain appeals, while appeals using a template format have generally been subject to a higher target. While benefitting from the certainty and accountability of reliance on decision targets, we have recognized that targets are only a goal. Where the appeal complement involves more complex issues or determinations, our projections for decision issuance may not be met in a given month.

- **Monitoring Decision Performance:** The Tribunal's four Team Leaders were responsible for monitoring the number and quality of decisions issued by their team members, assisted by decision quality standards which the Tribunal introduced in 1998. The Team Leaders report to the Chief Appeal Commissioner on a monthly basis.

"Reducing the backlog has been a systemic effort, requiring cooperation from the major components of the workers' compensation system - the WAP, the WCB, and the employer community. That the backlog has been diminished significantly in 1999 is, in my view, a reflection of the good working relationship that exists between all of us on a procedural and administrative level."

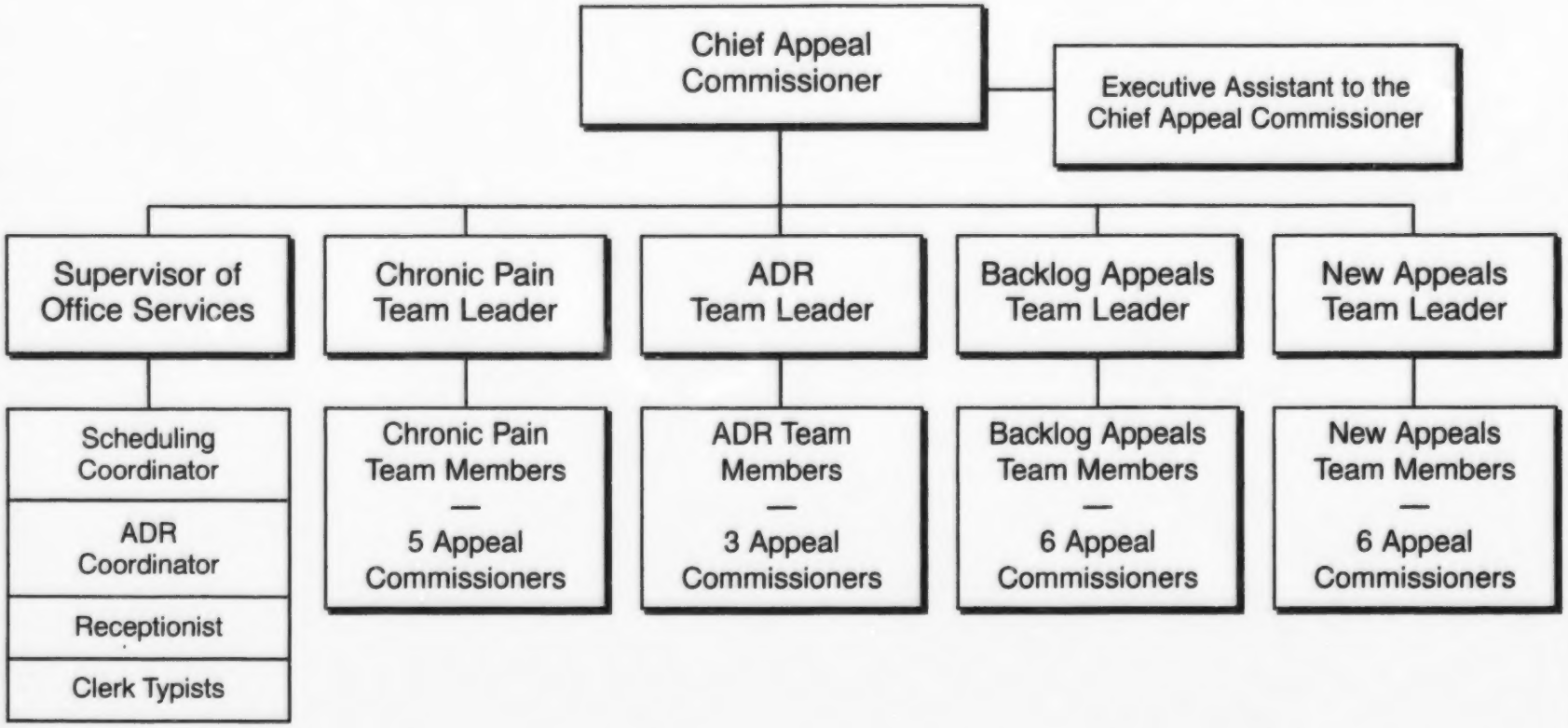
- Katherine Carrigan, Chief Appeal Commissioner

Preventing a Future Backlog

- **Responding to Notices of Appeal in a Timely Manner:** With the elimination of leave to appeal, an appellant's first correspondence from the Tribunal now indicates the mode of hearing (paper review or oral) and sets deadline dates, in the case of paper review hearings, of approximately 11 weeks from the date of the letter. (The 11-week period is at the request of the Workers' Advisers Program and the Workers' Compensation Board). On the expiry of the deadline dates the appeal is assigned to an Appeal Commissioner for a decision within 60 days. Most new appeals are, therefore, resolved within five to six months of the date they are filed with the Tribunal. They are processed in tandem with the backlog appeals as a separate appeal stream.

- **Team Approach:** As with the backlog appeals, new appeals filed with the Tribunal on or after April 16, 1999, are assigned to Appeal Commissioners dedicated to issuing decisions in this category. There is a core team membership and the group is lead by a Team Leader who oversees the work of, and acts as a resource to the team members. The Team Leader also reports, monthly, on the group's progress, to the Chief Appeal Commissioner. The role of Team Leader for this group is particularly important in identifying new or novel issues of law and policy which the Tribunal will be asked to resolve.

WORKERS' COMPENSATION APPEALS TRIBUNAL
ORGANIZATIONAL CHART 1999 - 2000


Chief Appeal Commissioner
Executive Assistant to the Chief Appeal Commissioner
Supervisor of Office Services
Chronic Pain Team Leader
ADR Team Leader
Backlog Appeals Team Leader
New Appeals Team Leader
Scheduling Coordinator
ADR Coordinator
Receptionist
Clerk Typists
Chronic Pain Team Members — 5 Appeal Commissioners
ADR Team Members — 3 Appeal Commissioners
Backlog Appeals Team Members — 6 Appeal Commissioners
New Appeals Team Members — 6 Appeal Commissioners

ADR: Phase II Completed

Nineteen ninety-nine witnessed the completion of Phase II of the Alternative Dispute Resolution (ADR) Program. The ADR Program was a WCAT initiative, undertaken in partnership with the Workers' Compensation Board (WCB), the Workers' Advisers Program (WAP) and, in Phase II, the employer community. A voluntary process, ADR began in 1997 as a way to provide a non-adversarial and informal setting in which appellants could attempt to resolve outstanding disputes with the WCB which were the subject of appeals to WCAT.

Phase II of WCAT's ADR Program differed from Phase I in that employers were able to participate. During the late summer and early fall of 1998, WCAT, the WCB, and the WAP conducted a series of public meetings across the province to inform employers about the launch of Phase II. Employers showed much enthusiasm about this method of settling outstanding appeals before WCAT.

The ADR Process Committee, which had been established for Phase I, continued as before with the addition, in January 1999, of an employer representative, Peter O'Brien, Vice-President Atlantic Canada, Canadian Federation of Independent Business. Given the employer participation in ADR, the ADR Process Committee developed new Terms of Reference, which were adopted on March 26, 1999. The appeal population eligible for participation in Phase II of the ADR Program included all new appeals filed with WCAT before April 1999, when major amendments were made to the Workers' Compensation Act.

"I found that the ADR process provided a wonderful opportunity for workers, employers, the WCB, and the Tribunal to come together informally and try to settle outstanding appeals. Often we were successful but even when the sessions didn't result in an agreement, workers appreciated the opportunity to discuss their appeals and to feel that they had been heard."

- Allen Murray, Appeal Commissioner

Many administrative processes developed during Phase I were continued in Phase II. However, an important distinction was that the letters of offer for ADR, which were sent to eligible appellants, were copied to employers with an Employer Instruction Sheet. This Employer Instruction Sheet offered three options to the employer. The employer could choose any of the following:

- to participate and be present at the ADR session
- to allow the ADR session to take place in its absence and agree to be bound by the terms of any settlement reached at the ADR session
- to indicate that it did not wish the ADR session to take place at all

The first mailing of offers for Phase II of the ADR Program occurred on January 4, 1999. The first sessions were held in March 1999 and continued throughout the year, concluding on January 31, 2000. During Phase II of the ADR Program, 1296 letters of offer to participate in ADR were sent to eligible appellants. Of these, 878 appellants accepted the offer to participate, while 187 appellants declined the offer and 231 appellants did not respond.

Of the 1296 letters of offer mailed, the employer response was as follows: 598 employers directed that an ADR session take place in their absence and agreed to be bound by the terms of any settlement reached at the session, 211 employers indicated they wished to be present and participate in the ADR session, 95 employers indicated they did not wish an ADR session to take place at all and 392 did not respond.

The administrative challenge, then, was to match the appellant and employer responses and to proceed with ADR sessions. From the responses, 671 appeals were able to proceed to ADR sessions. However, of this group, 204 appeals did not proceed for a number of reasons including: withdrawal of appeals by the appellant; the appellant's failure to obtain legal counsel as required by the ADR Terms of Reference; the inability of the WCB to make an offer due to the nature of the appeal; and a decision not to mediate chronic pain appeals through the ADR process in light of the recent amendments to the Workers' Compensation Act.

Once each of the participants indicated their desire that the ADR session take place, WCAT made the necessary arrangements. Four Appeal Commissioners from WCAT (Annette Boucher, John Greer, Andrea Smillie, and Allen Murray) acted as facilitators for the ADR sessions. In total, 467 ADR sessions were actually scheduled and held as part of Phase II. Of the 467 sessions, 206 resulted in settled appeals (44.1 per cent), 254 did not settle (54.3 per cent), and 8 were withdrawn (1.7 per cent).

The ADR Process Committee discussed the possibility of a further phase of ADR as a method of processing future appeals before WCAT. However, an agreement to proceed could not be reached with all of the participants. Further discussions may be initiated by WCAT, in future, should appropriate circumstances arise.

Chronic Pain

The Tribunal's work in the area of chronic pain was facilitated by the introduction of Bill 90. Among other things, the legislation set out a definition of chronic pain and provided specified benefits to persons with chronic pain who were injured on or after March 23, 1990, while indicating that benefits were unavailable to persons injured prior to that date. The new legislative amendments provided sufficient certainty to permit the Tribunal to begin rendering decisions in the approximately 800 appeals where chronic pain was potentially at issue.

In order to promote efficiency and consistency in decision-making, the Tribunal organized two Appeal Commissioner teams, based on date of injury, to deal with the chronic pain appeals. In September, these teams were resolved into one, for ease of administration. We also developed template formats for the chronic pain decisions, based on the categories of chronic pain reflected in the legislation.

In August, the Tribunal had occasion to consider two issues of legislative interpretation arising out of s.10E of the Act. Section 10E specifies compensation for persons whose chronic pain arose after an injury which occured during the window period (between March 23, 1990 and February 1, 1996).

In Decision No. 98-305-AD (August 4, 1999), the Tribunal considered the impact of s.10E on "multiple issues or appeals." The panel held that where an appellant has chronic pain and meets the criteria for s. 10E benefits, compensation cannot be provided for other injuries or claims in the appeal. This interpretation results from the language in s. 10E which makes the appeals null and void once the criteria in the section have been met. Where there is a second appeal dealing with a separate accident and chronic pain is not at issue, that appeal will survive.

On a reference from the Chair of the Workers' Compensation Board, under s.199(2)(b) of the Act, a Tribunal panel, in Decision 99-1735-AD (August 10, 1999), spoke to the appropriate formula to be used in calculating an earnings loss benefit awarded under s. 10E. The panel also considered the formula to be applied in calculating the extended earnings replacement benefit, under the same section, where the worker is already in receipt of a permanent impairment benefit at the time s.10E benefits are awarded.

While the Tribunal began issuing decisions in the area of chronic pain following the passage of Bill 90, we were soon faced with a number of constitutional challenges to these provisions. Because these challenges were a first for the Tribunal, we initially had to determine whether we had jurisdiction to consider whether our legislation was in conflict with the *Canadian Charter of Rights and Freedoms*.

A panel decision finding that we did, in fact, have jurisdiction to consider such *Charter of Rights* issues was released in August. Decision 98-077-PAD (August 27, 1999) also provided that the Attorney General of Nova Scotia was entitled to participant status before the Tribunal, as a "person with a direct and immediate interest" in *Charter of Rights* issues.

Having dealt with this preliminary matter, we proceeded to consider the main issues. Three test cases were identified, based on the accident time periods noted in the Act: pre-March 23, 1990, March 23, 1990 to February 1, 1996 and February 1, 1996 forward. Panels of Appeal Commissioners were struck to deal with the appeals and each panel proceeded by way of paper review.

While the panels conducted pre-hearing preparation, sought submissions and evidence and deliberated over their decisions, the remaining appeals which raised *Charter* issues were placed in abeyance.

The Tribunal's decisions, which were issued on January 31, found the provisions in relation to the pre-March 23, 1990 and the post-February 1, 1996 accident dates to be inconsistent with the *Charter of Rights*. The scheme in relation to the March 23, 1990 to February 1, 1996 period was found to be constitutionally valid. The following is a summary of the main findings in each of these decisions:

Decision 98-077-AD

The Board's FRP regulations and s. 10B(c) of the Act, as it applies to workers injured on or after February 1, 1996, were found to be unconstitutional, in that they infringe the equality guarantee in s. 15(1) of the *Charter*, with respect to "mental or physical disability," and are not saved by s. 15(2) or s. 1. The provisions state that no compensation is payable in connection with chronic pain to a worker injured on or after February 1, 1996, except as provided in the FRP regulations.

Decision 99-641-AD

Sections 10B(b) and (c) of the Act, as they pertain to injuries occurring prior to March 23, 1990, were found to be in violation of section 15(1) of the *Charter*, with respect to "mental or physical disability," and are not saved by s. 15(2) or s. 1. The provisions state that a personal injury by accident that occurred before February 1, 1996 is deemed never to have created a vested right to compensation for chronic pain and that no compensation is payable to a worker in relation to chronic pain.

Decision 96-025-AD

Section 10E of the Act was found to violate section 15(1) of the *Charter* in that it infringes the equality guarantee with respect to "mental or physical disability" and is not saved by s. 15(2) of the *Charter*. The panel went on to find that s. 10E and any reference to that section in s. 10B, was, however, saved by s. 1 of the *Charter*. Section 10B(a) provides that a personal injury occurring during the period March 23, 1990 to February 1, 1996 is deemed never to have included chronic pain and section 10B(c) states that no compensation in relation to chronic pain is payable to a worker injured during the window period, except as provided in s. 10E.

"My experience as a member of the Chronic Pain Team has been gratifying. The Team truly functions in a harmonious and supportive manner as each member of the team faces the challenges that accompany the interpretation and application of the new chronic pain provisions."

- Michael Hadskis, Appeal Commissioner

These decisions, as well as the Tribunal's earlier decision concerning its jurisdiction, have been appealed to the Nova Scotia Court of Appeal. In early February, the Workers' Compensation Board adjourned, for the purpose of developing policy, the Tribunal's remaining chronic pain appeals involving provisions found by the Tribunal to infringe the *Charter*. Approximately one-third of the Tribunal's remaining 300 chronic pain appeals were affected by this directive and those appeals continued to be postponed as of March 31, 2000. Although unable to proceed to final decisions in these appeals, we were able to determine the existence of chronic pain without addressing benefit entitlement and we began issuing preliminary decisions to this effect.

Approximately 34 Appeal Board backlog (transitional) appeals were exempt by regulation from the Board's statutory adjournment. Those appeals proceeded to a final decision. Apart from this, the Tribunal continued to render final decisions in relation to the "window period" appellants who were found to have chronic pain, since those appeals were also exempt from the Board's postponement directive.

Overall, 1999 saw a significant reduction in the potential number of chronic pain appeals in the Tribunal's backlog. Following the issuance of over 500 chronic pain decisions there were, at year end, 65 backlog chronic pain appeals remaining—an 87 per cent reduction from the previous year.

Environmental Illness

In 1999, the Tribunal made some strides in resolving the approximately 250 environmental illness appeals before it.

By way of background, last year a hearing panel had been struck in an attempt to resolve conflicting views within the Tribunal regarding the compensability of environmental illness. The panel dealt with several preliminary issues, including a challenge to the Board's right to participate in the Tribunal's appeals.

The panel's October 1998 preliminary decision placing limits on the Board's participation was appealed to the Court of Appeal. In a February 2, 1999 decision *(Workers' Compensation Board of Nova Scotia v. Workers' Compensation Appeals Tribunal of Nova Scotia, Byron Trusz and the Queen Elizabeth II Health Sciences Centre),* the Court overturned the Tribunal on this issue, stating that there was a clear legislative intent in the Act that the Board be permitted to participate in WCAT appeals by bringing forward evidence and making submissions. The panel also released a preliminary decision on February 3, 1999, addressing the production of documents in the possession of the Board.

Following eight days of testimony from nine witnesses in an oral hearing held in September, the panel began its deliberations on the main issues before it. Additional submissions and evidence were received and the panel ultimately released Decision 98-146-AD, on February 22, 2000. In this final decision, the panel found environmental illness syndrome [EIS] to be a partially work-related condition which manifests as stress, but not the type of stress for which the Act provides compensation.

The panel made a number of specific rulings of significance, not only in the area of environmental illness, but also in other areas. The rulings concerning environmental illness were as follows:

- Board Policy 1.3.3R was found to be inconsistent with the Act in that it requires an appellant to demonstrate the presence of a specific chemical, agent, toxin, or condition in the workplace that could explain the appellant's symptoms.

- The requirement implicit in Policy 1.3.3R exceeds the standard of proof required of a worker by s. 187 of the Act.

- The Appellant's disablement resulted in part from a non-work-related predisposition to this type of illness due to an absence of appropriate coping mechanisms.
- Environmental illness syndrome is multi-causal.
- "What is consistently found ... is that the physical symptoms experienced by EIS sufferers are a physical manifestation of an underlying psychological disorder" (page 27).
- The workplace may trigger environmental illness symptoms.
- EIS is a form of stress, but not usually an "acute reaction to a traumatic event"; therefore, it is non-compensable.

The following additional rulings were also significant:

- Board Policy 1.4.1, which permits reliance on "textbook[s] and other similar resources," is inconsistent with the Act in that it aims to control the Tribunal's procedures, a power reserved to the Tribunal by s. 240 of the Act.
- Board Policy 1.4.2, which provides that hearsay evidence shall not be given the same weight as factual evidence unless corroborated by factual evidence, is inconsistent with the Act in that it aims to control the Tribunal's procedures.
- The panel must accept all of the evidence submitted to it and must rely on the evidence that meets the criteria of relevance and significance.
- The Tribunal's role on appeals is that of both strict appeal and trial ***de novo*** (a full review of all issues and evidence); its ultimate role is best described as hybrid.

Following this decision, the participants to other environmental illness appeals were afforded a period in which to make submissions and tender evidence. The Tribunal anticipates resolving the remaining environmental illness appeals in the coming months.

Other Decisions of Note

The volume of decisions released by the Tribunal in 1999 was significant compared with previous years. The decisions rendered, in many cases, covered new ground. Apart from the Tribunal's appeal activities in the areas of chronic pain and environmental illness, a number of significant decisions were rendered, some of which were appealed. Several key decisions of the Tribunal and of the Court of Appeal are discussed below.

Statutory Bar to the Right of Action Against an Employer

In *Goulden et al. v. Workers' Compensation Appeals Tribunal (N.S.)* (1999), 177 N.S.R. (2d) 382 (CA) the Court, in overturning the Tribunal, held that the right to have a determination made as to whether an action is barred against an employer is a substantive one. It followed that the former Act provisions should apply to accidents that occurred when the former Act was in place and a judge of the Supreme Court, rather than an Appeal Commissioner, would have jurisdiction to hear the application. The Court noted that no appeal is possible from the decision of a Commissioner on the statutory bar because of a provision in the Act restricting appeals on this issue.

"Chairing a panel gave me the opportunity to bring divergent views together to meet some of the many challenges facing the workers' compensation system."

- Karen Crombie, Appeal Commissioner

Standard of Proof in Occupational Disease Cases

In *Workers' Compensation Board (N.S.) v. Johnstone, et al.* (January 6, 2000) the Court upheld the Tribunal's application of s. 187 of the Act, dealing with the standard of proof. The Tribunal had found that the Appellant's employment, which involved exposure to coke oven effluent, was a cause of his bladder cancer even though there was no expert evidence before it to establish the causal connection. Several key points were made by the Court:

- the Tribunal's reference to the expert evidence of a specialist in another case was similar to "generic evidence" derived from textbooks, in that it was non-specific to the worker but relevant to the cause of the occupational disease under consideration

- "the Tribunal's ability to cross-reference such evidence from its experience with other cases seems to characterize it as a specialized body with growing expertise, a point to be weighed in determining the deference to which it is entitled."

- considering the circumstantial evidence relied upon by the Tribunal as well as its powers to make inquiries and receive evidence, the Court concluded that, "... the rules of evidence under which the Tribunal functions appear to be less restrictive than those which apply to courts."

- "When there is no evidence raising a doubt, or if the evidence disputing the possibility is no stronger than the evidence in support of it, the decision must go to the worker. While s. 187 relieves the worker of proving the possibility he asserts to the civil standard of a preponderance of probabilities, there is no such relief in s. 187 for those opposing the worker's claim, who must meet the civil standard."

- s. 187 of the Act is intended to offset the imbalance between workers and the Board where proof of causation of an occupational disease is at issue. It was noted that the Board has "resources, investigative powers and expertise which may not be available to the worker."

"Considering the expertise of the Workers' Compensation Appeals Tribunal, the nature of its decisions, and the legislative intent expressed in the language of the statutory scheme, I agree with counsel that the standard of review of the Tribunal's decisions on conclusions of fact by this court remains patent unreasonableness."

- WCB v. Johnstone, *at page 13*

Earnings Replacement Benefits

In *Fraser v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (February 9, 2000), the Court of Appeal ruled that the Tribunal, on finding that the appellant had an ongoing earnings loss in relation to a workplace injury and that his condition had become permanent, was obligated to refer the case to the Board for determination of his entitlement to further benefits. The Court also stated that the Tribunal could make a finding of permanency under s. 34 of the Act without actually rating the impairment.

Subsequent to *Fraser,* the Tribunal considered the Court's ruling in a panel decision on the test for entitlement to temporary earnings replacement benefits. In Decision 99-1954-AD (February 18, 2000), the panel found that in order to be

entitled to temporary earnings replacement benefits:

- the worker must have suffered a loss of earnings
- the worker's loss of earnings must be or continue to be causally related to the injury
- the worker must not have reached 65 years of age

Provided these factors have been met, temporary earnings replacement benefits are payable until the later of:

- the date the worker has a permanent impairment under s. 34 of the Act (whether determined by the Board or by the Tribunal, based on the medical evidence)
- the date of completion of a vocational rehabilitation program if begun on or after the date of permanent impairment

The panel concluded its analysis by stating that once the Tribunal has made findings of entitlement to earnings replacement benefits and of permanency, it must refer the matter to the Board for consideration of entitlement to extended earnings replacement benefits.

Recalculation of Permanent Benefits for "Window Period" Injuries

In Decision 99-1079-AD (October 8, 1999), an Appeal Commissioner applied a previous decision of the Tribunal in holding that the date of recalculation of permanent benefits awarded under the former Act is February 1, 1996. The former Act was applied in determining entitlement as well as in calculating benefits until February 1, 1996. As of that date, the current Act was to be applied in recalculating the award. This decision was subsequently appealed to the Court of Appeal.

Board Reconsideration of Decisions Based on "New Evidence"

A Tribunal panel, in Decision 99-1882-PAD (March 6, 2000), found Board Policy 8.1.7R1 to be inconsistent with the Act in that the policy prevents the Board from reconsidering its decisions except where there is "new evidence." A subsequent Tribunal decision, Decision 99-1969-AD (March 21, 2000), set out criteria to be considered when reopening a final decision of the Board.

Employer Assessments

The Tribunal held its first employer assessment hearing in June. The hearing, concerning classification of the employer for purposes of premium rate setting, was conducted by a panel of Appeal Commissioners. In Decision 99-580-DA (October 12, 1999), the panel upheld the industrial classification for rate-setting purposes applied by the Board to one of two businesses under consideration and recommended reclassification of the other, applying the "principal activity" test.

Decisions of the Supreme Court of Canada

In early January 1999 the Supreme Court of Canada dismissed (without reasons) Applications for Leave to Appeal from two judgments of the Nova Scotia Court of Appeal on Tribunal decisions.

Nova Scotia (Workers' Compensation Board) v. Muise (January 7, 1999) involved questions as to whether the former or the current Act should apply to the claim and whether the Court of Appeal made an error in considering and in drawing conclusions from "background information" about the workers' compensation system when deciding the appeal.

In *Rijntjes v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (January 7, 1999), the limits placed on the Court of Appeal's review of WCAT decisions by s. 24, the former Act's benefit of the doubt provision was at issue. The Court of Appeal had stated that the Legislature intended the interpretation and application of ss. 24 and 9(1) to be dealt with by the Board and "the review process set up under the statute." WCAT's interpretation and application of section 24 was found to be entirely within its jurisdiction.

"I am very pleased with the continued emphasis by WCAT's Appeal Commissioners on the production of high quality decisions, especially at a time when decision output is a necessary focus for the Tribunal."

- Katherine Carrigan, Chief Appeal Commissioner

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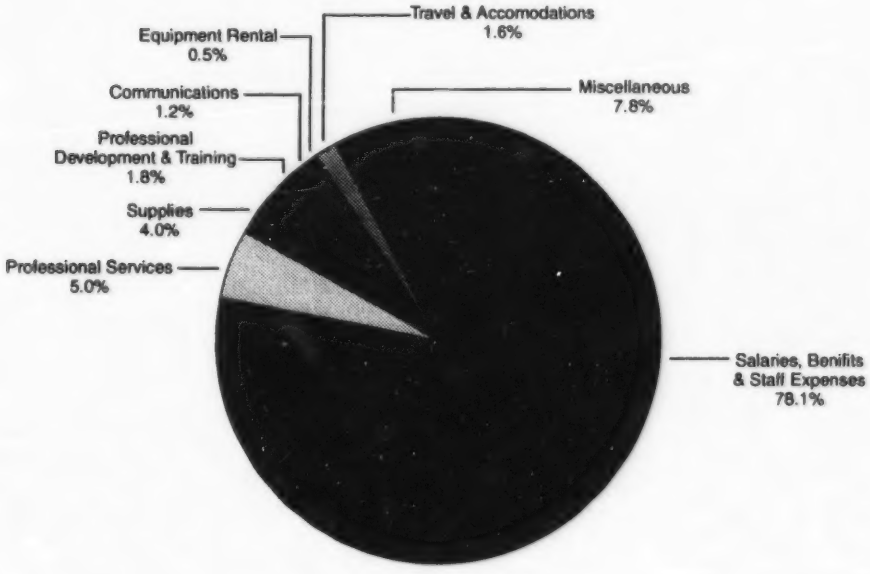
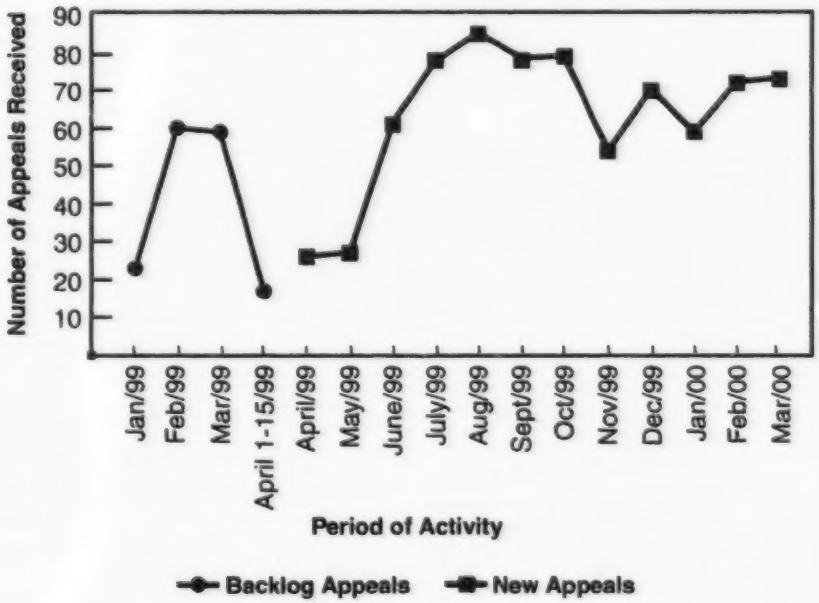
Budget Expenditures for Fiscal Year Ending March 31, 2000

	Regular	Bill 90	Total
Salaries, Benefits & Staff Expenses	832,494	681,131	1,513,625
Professional Services	87,245	9,694	96,939
Supplies	44,999	32,317	77,316
Professional Development & Training	22,312	12,928	35,240
Communications	22,007	2,081	24,088
Equipment Rental	3,714	5,635	9,349
Travel & Accommodations	24,273	6,680	30,953
Miscellaneous	90,024	61,276	151,300
Total	**$1,127,068**	**$811,742**	**$1,938,810**



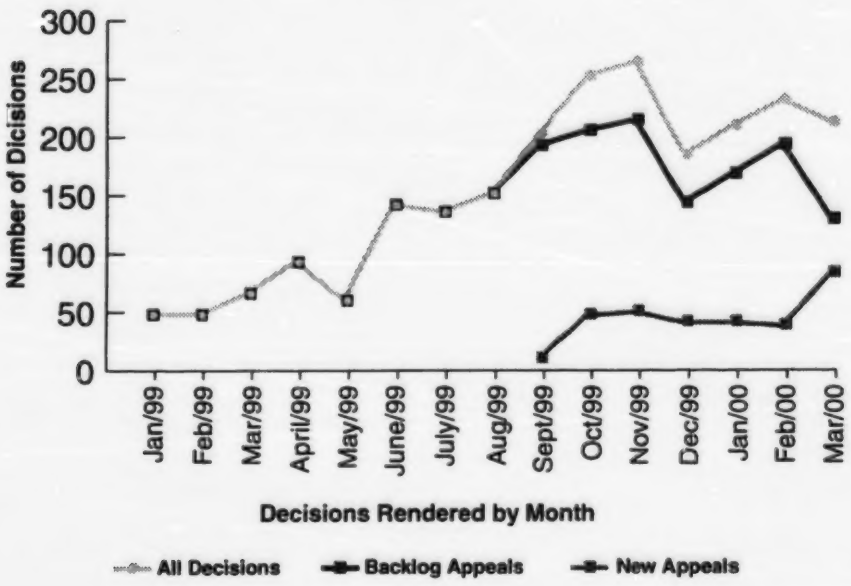
Appeals Received

Month	Backlog Appeals	New Appeals	Total
January 1999	23	0	23
February	60	0	60
March	59	0	59
April 1	17	0	17
April 16	0	26	26
May	0	27	27
June	0	61	61
July	0	78	78
August	0	85	85
September	0	78	78
October	0	79	79
November	0	54	54
December	0	70	70
January 2000	0	59	59
February	0	72	72
March	0	73	73
Total	**159**	**762**	**921**



Final Decisions Rendered

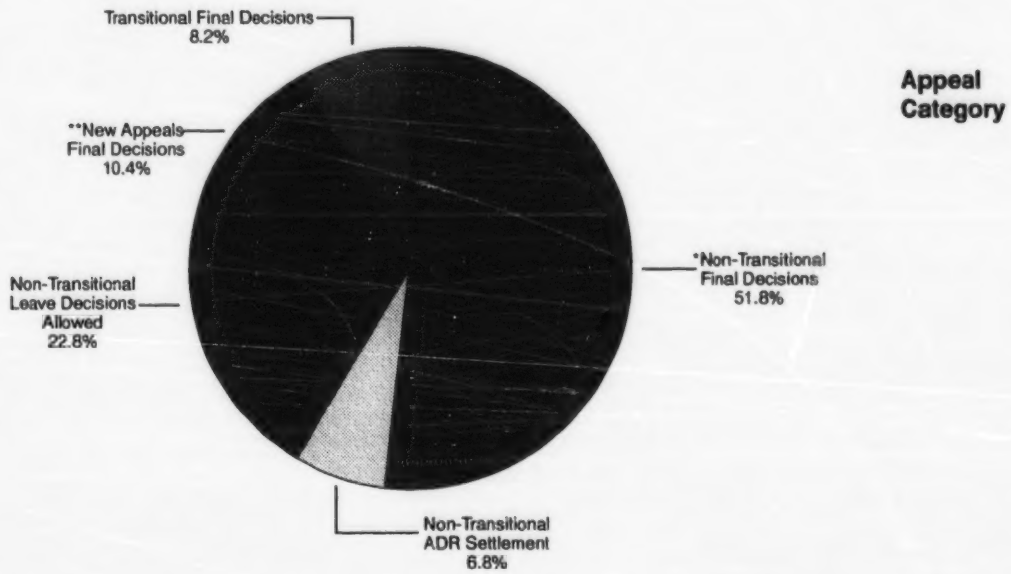
	Backlog Appeals		New Appeals	Total
	Transitional	Non-Transitional		
January 1999	8	40		48
February	7	41		48
March	0	66		66
April	9	84		93
May	6	54		60
June	47	95		142
July	32	104		136
August	24	128		152
September	28	165	10	203
October	20	186	47	253
November	6	209	50	265
December	2	142	41	185
January 2000	1	168	41	210
February	39	155	38	232
March	17	113	83	213
Total Decisions	**246**	**1750**	**310**	**2306**



Final Decisions and Notices of Leave/Leave Decisions by Appeal Category

Backlog	
Appeal Board Backlog (Transitional)	
Final Decisions	246
References to Hearing Officer	0
Preliminary Decisions	2
Notices of Leave	0
Non-Transitional	
Final Decisions (Appeal Process)	1533
ADR Settlement Decisions	204
References to Hearing Officer	11
Preliminary Decisions	25
Leave Decisions	682
Granted	680
Denied	1
Referred to Hearing Officer	1
New Appeals	
Final Decisions (Appeal Process)	307
Referred to Hearing Officer	3
Preliminary Decisions	19

Decisions Rendered



* Reference to Hearing Officer Decisions included in Non-Transitional Final Decisions Leave Decision Denials included in Non-Transitional Final Decisions

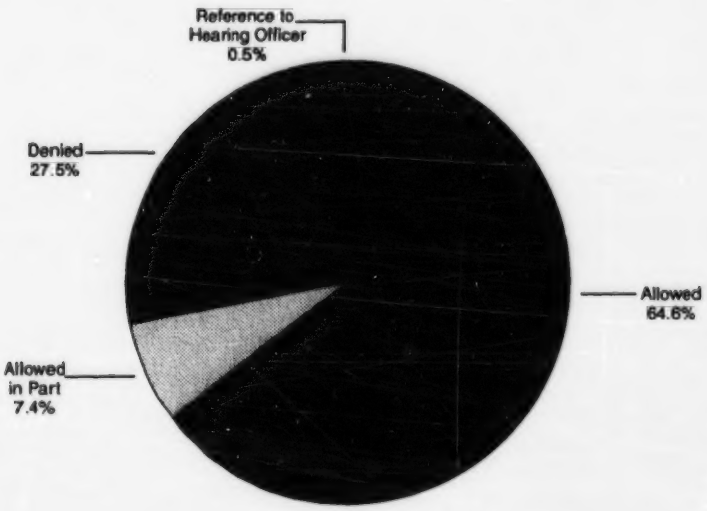
** Reference to Hearing Officer Decisions included in New Appeals Final Decisions

Decisions by Outcome

	Allowed	Allowed in Part	Denied	Reference to Hearing Officer	Total
Final Decisions Backlog	1132	190	661	11	1994
Leave Decisions	680	0	1	1	682
New Appeals	117	30	160	3	310
Total	1929	220	822	15	2986

Decisions Rendered

Appeal Outcome



Mode of Hearing

	Oral Hearings Held	ADR Sessions Held	Paper Review Final Decisions
Totals	**288**	**467**	**1138**

Appeal Hearings